IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 695

CHARLES C. GREEN, *et al.*,

Petitioners,

—v.—

COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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Citations to Opinions Below

The District Court filed memorandum opinions on May 17, 1966 and June 28, 1966. Both, unreported, are reprinted appendix at pp. 47-48a and 53-61a. The June 12, 1967 Court of Appeals opinions, reprinted appendix pp. 63-89a, are reported at 382 F. 2d 326 and 338.

Jurisdiction

The judgment of the Court of Appeals was entered June 12, 1967, appendix p. 90a. Mr. Justice Black, on September 8, 1967, extended time for filing the petition for

writ of certiorari until October 10, 1967 (91a). The petition for certiorari was filed October 9, 1967 and was granted December 11, 1967 (92a). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Question Presented

Whether—13 years after *Brown* v. *Board of Education*—a school board discharges its obligation to conduct a unitary non-racial school system, by adopting a freedom of choice desegregation plan, where the evidence shows that such plan is not likely to disestablish the dual system and where there are other methods, no more difficult to administer, which would immediately produce substantial desegregation.

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

Petitioners seek review of the constitutional adequacy of a freedom of choice desegregation plan adopted by defendant School Board and approved by the Court below *en banc*, Judges Sobeloff and Winter disagreeing with the majority opinion.

I. *The Pleadings*

Petitioners, Negro parents and children of New Kent County, Virginia, filed on March 15, 1965, in the United States District Court for the Eastern District of Virginia,

a class action seeking injunctive relief against the maintenance of separate schools for the races. The complaint named as defendants the County School Board, its individual members, and the Superintendent of Schools.[1]

The defendants filed, on April 5, 1965, a Motion to Dismiss the complaint on the sole ground that it failed to state a claim upon which relief could be granted (13a). In an order entered on May 5, 1965, the district court deferred ruling on the motion and directed the defendants to file an answer by June 1, 1965 (14a). Defendants answered asserting that plaintiffs were permitted under existing policy (the pupil placement law) to attend the school of their choice without regard to race, subject only to limitations of space and denied that the court had jurisdiction to grant any of the relief prayed (21-22a).

Thereafter, to comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 241, and regulations of the United States Department of Health, Education and Welfare, the New Kent County School Board, on August 2, 1965, adopted a freedom of choice desegregation plan (to be placed into effect in the 1966-67 school year) and on May 10, 1966 filed copies thereof with the District Court.

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[1] The action was filed pursuant to 28 U. S. C. §1331 and §1343, and 42 U. S. C. §1981 and §1983. The complaint alleged that (7-8a):

> Notwithstanding the holding and admonitions in Brown v. Board of Education, 347 U. S. 483 (1954) and 349 U. S. 294 (1955), the defendant school board maintains and operates a biracial school system. . . .
>
> [that the defendants] ha[d] not devoted efforts toward initiating non-segregation in the public school system, [and had failed to make] a reasonable start to effectuate a transition to a racially non-discriminatory school system as under paramount law it [was] their duty to do.

II. *The Plan Adopted by the Board*

The plan provides essentially for "permissive transfers" for 10 of the 12 grades. Only students eligible to enter grades one and eight are required to exercise a choice of schools. It provides further that "any student in grades other than grades one and eight for whom a choice is not obtained will be assigned to the school he is now attending."[2] It states that no choice will be denied other than for overcrowding in which case students living nearest the school chosen will be given preference (34-40a).

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[2] By failing to require, at least in its initial year, that every student make a choice, the plan permits some students to be assigned under the former dual assignment system until approximately 1973. Under the plan students entering other than grades one or eight who do not exercise a choice are assigned to the school they are then attending. Thus, a student, who began school in fall, 1965, one year before the plan went into effect and was therefore assigned to a school previously maintained for his race would, unless he affirmatively exercised a choice to go elsewhere, be reassigned there for the remainder of his elementary school years. Similarly, students who entered high school prior to 1966-67 under the old dual assignment system, would, unless they took affirmative action to transfer elsewhere, be reassigned to that school until graduation. The plan, then, permits some students (those who began at a school before it went into effect) to be reassigned for as long as up to seven years (in the case of a first grader) to schools to which they originally had been assigned on the basis of race. It need hardly be said that such a plan—one which fails immediately to abolish continued racial assignments or reassignments—may not stand under *Brown* v. *Board of Education*, 347 U. S. 483 and 349 U. S. 294. The Fifth Circuit has rejected plans having that effect. See *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 890-891, *aff'd with modifications on rehearing en banc*, 380 F. 2d 385, *cert. denied* sub nom. *Caddo Parish School Board* v. *United States*, 389 U. S. 840, 19 L. Ed. 2d 103. We point this out only to fully describe the workings of the plan. For overturning the decision below on this ground would be insufficient to protect petitioners' rights. As we more fully develop later what is objectionable about this plan is its employment of free choice assignment provisions to perpetuate segregation in an area, where, because of the lack of residential segregation, it could not otherwise result.

III. *The Evidence*

New Kent is a rural county in Eastern Virginia, east of the City of Richmond. There is no residential segregation; both races are diffused generally throughout the county[3] (cf. PX "A" and "B"; see also the opinion of Judge Sobeloff at pp. 72a, 23a).[4] There are only two public schools in the county: New Kent, the formerly all-white combined elementary and high school, and George W. Watkins, an all-Negro combined elementary and high school.

Students:[5] During the 1964-1965 school year some 1291 students (approximately 739 Negroes, 552 whites) were enrolled in the school system. There were no attendance zones. Each school served the entire county. Eleven Negro buses canvassed the entire county to deliver 710 of the 740 Negro pupils to Watkins, located in the western half of the county. Ten buses transported almost all of the 550 white pupils to New Kent in the eastern half (see PX "A" and "B" and 24a, no. 4).

As the following table[6] indicates, the Negro school was more overcrowded and had a substantially higher pupil-teacher ratio, and larger class sizes than the white school:

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[3] The Census reports show that the Negro population was substantially the same in each of the four magisterial districts in New Kent County: Black Creek—479, Cumberland—637, St. Peters—633, and Weir Creek—565. See U. S. Bureau of the Census. *U. S. Census of Population:* 1960 *General Population Characteristics, Virginia.* Final Report PC(1)-48B.

[4] The prefix "PX" refers to plaintiffs' exhibits. Exhibits "A" and "B" show the bus routes for each of the two county schools. Because of the difficulty in doing so, they have not been reproduced in the appendix. Each exhibit shows the routes travelled by the various buses bringing children to that particular school. Each school is served by buses that traverse all areas of the county.

[5] The information that follows was obtained from defendants' answers to plaintiffs' interrogatories (23-33a).

[6] The data was compiled from 23-33a, in particular nos. 1-c, 1-f, 1-g, and 4.

Name of School	Pupil-Teacher Ratio	Average Class Size	Overcrowding Variance From Capacity (Elem. Grades	Number Buses	Average Pupils Per Bus
New Kent (white) 1-12	22	21	+ 37 (9%)	10	54.8
George W. Watkins (Negro) 1-12	28	26	+118 (28%)	11	64.5

From 1956 through the 1965-66 school year, school assignments of New Kent pupils were governed by the Virginia Pupil Placement Act, §22-232.1 *et seq.* Code of Virginia, 1950 (1964 Replacement Volume), repealed by Acts of Assembly, 1966, c. 590, under which any pupil could request assignment to any school in the county; children making no request were assigned to the school previously maintained for their race.[7] The free choice plan the Board adopted in August, 1965 was not placed into effect until the 1966-1967 school year by which time it had been approved by the district court.

Despite their rights under the pupil placement procedure, up to and including the 1964-1965 school year no Negro pupil ever sought admission to New Kent and no white

[7] Section 22-232.20 provided in part:

"... any child who wishes to attend a school other than the school which he attended the previous year shall not be eligible for placement in a particular school unless application is made therefor ..."

Section 22-232.6 provided:

"After December 29, 1956, each school child who has heretofore attended a public school and who has not moved from the county, city or town in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled for good cause shown, in a different school by the Pupil Placement Board."

pupil ever sought admission to Watkins (25a, no. 7). Although, as the following table shows, some Negro students have since chosen to attend New Kent, no white pupil has ever attended Watkins:

STUDENT BODY BY RACE[8]

YEAR	NEW KENT			WATKINS		
	White	*Negro*	*Other*	*White*	*Negro*	*Other*
1964-65	552	0	0	0	739	0
1965-66	555	35	0	0	691	0
1966-67	517	111	0	0	628	0
1967-68	519	115	10	0	621	0

Thus, as late as 13 years after the decision in *Brown*, 85% of the Negro students in the county attend school only with other Negroes.

Faculty: Teachers' contracts are for one year only. Until the 1966-67 school year, the Board adhered to a policy of assigning only white teachers to New Kent and only Negro teachers to Watkins. Despite the declarations of the Board, its policy has remained essentially unchanged as the following table shows:

FACULTY COMPOSITION BY RACE[9]

	NEW KENT		WATKINS	
	White	*Negro*	*White*	*Negro*
1964-65	26	0	0	26
1965-66	26	0	0	27
1966-67	28.4	.4	0	27
1967-68	28	.2	1	29.8

[8] The record in this case, like the records in all school desegregation cases, is necessarily stale by the time it reaches this Court. In this case the 1964-65 school year was the last year for which the record supplied desegregation statistics. Information regarding student and faculty desegregation during the 1965-66, 1966-67 and 1967-68 school years was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. Certified copies thereof and an accompanying affidavit have been filed with this Court and served upon opposing counsel.

[9] This information is taken from the HEW documents referred to in Note 8, *supra*, and from number 1-f on 24a. Principals, librarians and other non-teaching personnel are not included.

In sum, during the current year, 1967-68, faculty integration consists of the assignment of one full-time white (of a total of 30.8 teachers) to Watkins and one part-time (the equivalent of one day each week) Negro teacher to New Kent. All the full-time teachers at that school are still white.

IV. *The District Court's Decision*

On May 4, 1966, the case was tried before the District Judge, Hon. John D. Butzner, Jr., who, on May 17, 1966, entered a memorandum opinion and order: (a) denying defendants' motion to dismiss, and (b) deferring approval of the plan pending the filing by the defendants of "an amendment to the plan [which would provide] for employment and assignment of staff on a non-racial basis" (47-49a).

The Board filed on June 6, 1966, a supplement to its plan dealing with school faculties (50a). On June 10, 1966, plaintiffs filed exceptions to the supplement contending (a) that the supplement failed to provide sufficiently for faculty and staff desegregation, and (b) that plaintiffs would continue to be denied constitutional rights under the freedom of choice plan and that the defendants should be required to assign students pursuant to geographic attendance areas (52a).

On June 28, 1966, the district court entered a memorandum opinion and an order approving the freedom of choice plan as amended (53-62a).

V. *The Court of Appeals' Opinion*

On appeal to the Court of Appeals for the Fourth Circuit petitioners contended that in view of the circum-

stances in the county, the freedom of choice plan adopted by the defendants was the method least likely to accomplish desegregation and that the district court erred in approving it.

On June 12, 1967, the Court, *en banc,* affirmed the district court's approval of the freedom of choice assignment provisions of the plan, but remanded the case for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal objective time table," some of the faculty provisions of the decree entered by the Fifth Circuit in *United States* v. *Jefferson County Board of Education, supra* (70-71a).

Judges Sobeloff and Winter concurred specially with respect to the remand on the teacher issue but disagreed on other aspects. Said Judge Sobeloff (71-72a):[10]

> I think that the District Court should be directed not only to incorporate an objective time table in the School Board's plans for faculty desegregation, but also to set up procedures for periodically evaluating the effectiveness of the Boards' "freedom-of-choice" plans in the elimination of other features of a segregated school system.
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> * * * * *
>
> . . . Since the Board's "Freedom-of-choice" plan has now been in effect for two years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades,

[10] This case was decided together with a companion case *Bowman* v. *County School Board of Charles City County, Virginia,* No. 10793, for which no review is sought. While the opinion discussed herein was rendered in the *Charles City* case, it was expressly made applicable to *New Kent* (64a); similarly Judge Sobeloff stated that his opinion in *Charles City* applied to *New Kent* (p. 71a). The opinion in the *Charles City* case is at 65-89a.

> clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well (73a).

While they did not hold, as petitioners had urged, that the peculiar conditions of the county made freedom of choice constitutionally unacceptable as a tool for desegregation they recognized that it was utilized to maintain segregation (76-77a):

> As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, *the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning*—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, *is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning.* The conditions in this county represent a classical case for this expedient. (Emphasis added.)

While the majority implied that freedom of choice was acceptable regardless of result, Judges Sobeloff and Winter stated the test thus (79a):

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end.

SUMMARY OF ARGUMENT

Brown condemned not only compulsory racial assignments of public school children, but required "a transition to a racially non-discriminatory system." That goal is not achieved if some schools are still maintained or identifiable as being for Negroes and others for whites. It cannot be achieved until the racial identification of schools, consciously imposed by the state during the era of enforced segregation, has been erased. The specific direction in *Brown II* and general equitable principles require that school districts formerly segregated by law, employ affirmative action to achieve this end.

If the time for deliberate speed has indeed ended, as this Court has said (Note 38, *infra*), lower courts must now fashion decrees which, consistent with educational and equitable principles, will speedily and effectively disestablish the dual system thereby achieving the unitary nonracial system mandated by the Constitution. That was not done here.

Freedom of choice desegregation plans typically leave the dual system undisturbed. The overwhelming majority of school districts in *Brown*-affected states have adopted such plans (Note 18, *infra*) and available statistics demon-

strate that they have not disestablished the dual system (*infra*, pp. 26-27). At best, such plans leave one segment, the Negro segment, intact (*Ibid.*). Yet, most, but not all, lower courts have not responded to the obvious: such plans are not only wasteful and inefficient, but by nature are incapable of effectuating that transition.

Lengthy related experience under the Virginia Pupil Placement Law demonstrated that plans under which students assign themselves were not likely to disestablish the dual system in New Kent County. Petitioners, moreover, furnished uncontradicted evidence that another method, more feasible to administer would immediately disestablish the dual system. Nonetheless, the Board failed to offer any reasons justifying delay in achieving a unitary nonracial system. There was no suggestion that administrative difficulties would preclude the division of the county into two school attendance areas or the assignment of elementary school pupils to one school and high school students to the other.

Where alternative means of immediate accomplishment of a unitary non-racial school system are so readily available, judicial approval of free choice is constitutionally impermissible.

ARGUMENT

I.

Introduction

The question here is whether in the late sixties, a full generation of public school children after *Brown* v. *Board of Education,*[11] school boards may employ so-called freedom of choice desegregation plans which perpetuate racially identifiable schools, where other methods, equally or more feasible to administer, will more speedily disestablish the dual systems.

Other plans or programs, similarly ineffective where adopted, are under review in *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.,* No. 740, and *Raney* v. *The Board of Education of the Gould School District,* No. 805.[12] The controversies in all three cases concern the precise point at which a school board has fulfilled its obligations under *Brown;* and all three present for determination the question whether school districts formerly segregated by law must employ affirmative action to erase state-imposed racial identification of their schools.

The most marked and widespread innovation in school administration in southern and border states in the last fifty years has been the change in pupil assignment method in the years since *Brown,*[13] from geographic attendance

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[11] 347 U. S. 483 (*Brown I*); 349 U. S. 294 (*Brown II*).

[12] All three cases will be argued together. See 36 U. S. L. W. 3286 (U. S. Jan. 15, 1968).

[13] See generally, Campbell, Cunningham and McPhee, *The Organization and Control of American Schools, 1965.* ("As a consequence of [*Brown* v. *Board of Education, supra*], the question of attendance areas has become one of the most significant issues in American education of this Century" (at 136).)

earliest landmark decisions construing the Fourteenth Amendment. Striking down a statute excluding Negroes from service on juries, the Court there observed (100 U.S. at 308):

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The *Brown* opinion merely returned to this authentic interpretation of the Amendment when it noted (approvingly quoting one of the lower courts, 347 U.S. at 494): "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.".

The principle is not limited to situations in which the State teaches a philosophy of racial inferiority by expressly compelling segregation. The same message can be conveyed by lesser measures and they are equally forbidden. *E.g., Lombard* v. *Louisiana,* 373 U.S 267; *Robinson* v. *Florida,* 378 U.S. 153. Indeed, in some contexts, the Equal Protection Clause prohibits official action which merely facilitates, or gives effect to, private discrimination on the ground of race. *E.g.,*

Anderson v. *Martin*, 375 U.S. 399; *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151; *Shelley* v. *Kraemer*, 334 U.S. 1. And see *Reitman* v. *Mulkey*, 387 U.S. 369. The State cannot gratuitously take steps to make discrimination easy; the Fourteenth Amendment bars State action which unnecessarily creates opportunities for the play of private prejudice. So, here, we submit, the State authorities overstepped the constitutional line by adopting student assignment plans which predictably, if not designedly, cater to the preference of white students to avoid desegregated schools.

III

It remains to suggest the appropriate remedy in each of the cases before the Court. As we have noted, the central fact in all three school districts involved is that an overwhelming majority of the Negro student population still attend all-Negro schools because the prevailing "freedom-of-choice" or "free transfer" plans allow the white students who would otherwise attend those schools to assign themselves elsewhere. That result condemns the freedom-of-choice assignment system in each of the cases, in light of the availability of other more promising alternatives.

We need not particularize the details of an appropriate plan for each district. But it is apparent that in both New Kent, Virginia (No. 695) and Gould, Arkansas (No. 805), each of which have only two schools, a substantial degree of desegregation would be achieved if geographical zoning were adopted, And, of course, full desegregation would result if the two

schools in each district were "paired", one as the elementary school for the entire area, the other as the secondary school. Either solution is presumably sound educationally and nothing in the record suggests that either alternative presents special administrative problems.

The Jackson, Tennessee, situation (No. 740) is more complex, but the availability of alternate solutions is equally clear. In this district, geographic attendance zones are already in operation and the obvious first step therefore seems to be to eliminate the superimposed "free transfer" provision of the plan which has worked to preserve as all-Negro each of the formerly Negro elementary schools, the formerly Negro junior high school, and the formerly Negro high school. There remains, however, a challenge to the three junior high school zones as "gerrymandered."[5]

On the face of the record, the charge of gerrymandering is well founded. Indeed, it appears that substantially greater desegregation at the junior high school level would have resulted if the elementary zone lines had been followed to create a feeder system. No explanation was offered for the deviations from this traditional plan. Moreover, it is demonstrable that other alternative boundaries—with no apparent disadvantages—can be drawn to achieve still more desegregation in the three schools involved. Quite plainly, the school authorities made no effort in this direction. In our view, they should be directed—subject, of course, to the supervision of the district court—to

[5] A challenge to the elementary school zones was sustained by the district court and is not in issue here.

redraw the junior high school zones with this purpose in view.

Respectfully submitted.

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